IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

ORDER
IN
S.B. Civil Second Appeal No.122/1988

1. Hari Singh (since deceased) through L.Rs.
Raghvendra Singh & Others
AND
2. Gulab Singh (since deceased) through L.Rs.
Ajay Singh
...defendants-appellants
Versus
Durga Lal (since deceased) through L.Rs.
Smt. Ram Swaroopi Devi & Others
...plaintiff-respondents

Date of Order :::

Present
Hon'ble Mr. Justice Narendra Kumar Jain

Shri G.K. Garg, Counsel for defendants-appellants
Shri Rajnish Gupta, Counsel for plaintiff-respondents
####

By the Court:-

This Court, vide its order dated 4th of July, 1989, while admitting the second appeal, formulated the following substantial question of law:-

> "Whether the first appellate court committed an error of law in not raising presumption under Sec.90 of the Evidence Act, in respect of document Ex.1A, which is of the S.Y.1890 and which was produced by the appellants and whether the same was produced from proper custody and

> supports the title of the appellants to the suit property."

During the course of arguments, it was felt necessary that a substantial question of law is further involved in this second appeal and both the parties were heard, in detail, on the same. The additional substantial question of law is as under:-

> "Whether the finding of both the courts below in respect of possession of the plaintiff over the property, in dispute, is vitiated on account of misreading of evidence?"

The facts, for disposal of the second appeal, in brief, are that plaintiff Durga Lal filed a suit for permanent injunction in respect of the disputed house in the court of Munsiff Magistrate, Karauli on 20.9.1973 against three defendants, namely, Hari Singh, Gulab Singh and Sher Singh, all Sons of Chander Singh. It was pleaded in the plaint that the disputed house, as described in the map annexed with the plaint, is the ancestral property of the plaintiff and the plaintiff is the owner and in possession of the same. The defendants are not concerned with the said house. However, few days ago they came in the house

and started quarreling with the plaintiff and they wanted to dispossess him, therefore, it became necessary to file the present suit. It was prayed in the suit that the defendants be restrained, by way of permanent injunction, that they should not interfere in the peaceful possession of the plaintiff over the disputed house and they should not dispossess the plaintiff.

The suit was contested by the defendants by filing joint written statement dated 11.1.1974, wherein it was pleaded that the disputed house is in the ownership and possession of the defendants. The plaintiff was domestic servant of the defendants, therefore, the same had been given to the plaintiff, about four to five years ago, as a licensee. It was pleaded that the property, in dispute, belongs to the defendants and they are the owner and in possession of the same, therefore, the plaintiff is not entitled to any injunction as prayed in the plaint and it was prayed that the suit be dismissed with costs.

The learned lower court, on the basis of pleadings of the parties, framed five issues on 12.8.1974, which have been reproduced in the judgments

passed by both the courts below.

The Issue no.1 is whether the plaintiff is the owner and in possession of the disputed property, the description of which has been given in the map annexed with the plaint. The Issue no.2 is whether the defendants want to dispossess the plaintiff, therefore, the plaintiff is entitled to get injunction in his favour. The Issue no.3 is as to whether the valuation of the property is Rs.4000/-, therefore, the court-fee paid is insufficient. The Issue no.4 is as to whether Bhagwat Singh and Jagan Singh are necessary parties. The Issue no.5 is about relief.

In support of the case, the plaintiff examined himself as PW-1, Jatan Singh as PW-2, Durga Singh as PW-3 and Kalyan Singh as PW-4.

On behalf of the defendants, the statements of DW-1 Gulab Singh, DW-2 Chirmoli, DW-3 Rang Lal, DW-4 Shiv Nath Singh, DW-5 Risal Singh and DW-6 Shrawan Singh, were recorded. The defendants produced a document Ex.1A, a sale-deed, in documentary evidence.

The learned trial court, after considering the

oral and documentary evidence on the record, decided Issue no.1 partly in favour of the plaintiff and partly in favour of the defendants. It was held that the plaintiff has failed to prove that the property, in dispute, is his ancestral property. So far as possession over the disputed property is concerned, it was held that the plaintiff is in possession of the property in dispute. So far as Issue no.2 is concerned, the learned lower court held that in view of the finding in respect of the possession over the disputed property, in favour of the plaintiff, the plaintiff cannot be dispossessed without due process of law, therefore, the plaintiff is entitled to a decree of permanent injunction. The other issues were also decided. Consequently, the suit of the plaintiff for permanent injunction was decreed and it was directed that the defendants should not interfere in the peaceful possession of the plaintiff and they should not dispossess the plaintiff from the disputed house. Being aggrieved with the same, an appeal was preferred by the defendants.

The first appellate court, vide its judgment and decree dated 18.12.1987, not only dismissed the appeal of the defendants but also reversed the finding

of the lower court in respect of the ownership of the defendants over the disputed house. The first appellate court held that the plaintiff is the owner of the house, in dispute. It is relevant to mention that the plaintiff had not preferred any cross-appeal or cross-objection in respect of the finding relating to ownership of the house, in dispute, recorded by the lower court against him but the first appellate court, while exercising powers under Order 41 Rule 22 of the CPC and in view of the judgment of the Madras High Court in the case of ***M.M. Chetti Vs. C. Coomaraswamy (AIR 1980 Madras 212)***, wherein it was held that the respondent is entitled to challenge the finding of the Issue which was decided by the lower court against him, even without filing any cross-objection, reversed the finding of lower court that defendants are owners of the disputed shop. Under these circumstances the present second appeal has been preferred by the defendants.

I have heard learned counsel for both the parties on the above referred both questions.

The learned counsel for the defendants-

appellants, Shri G.K. Garg, contended that the learned first appellate court committed an illegality in reversing the finding of the lower court in respect of the ownership of the defendants over the disputed house without any cross-appeal or cross-objection. The provisions of Order 41 Rule 22 of the CPC could not have been invoked in the facts and circumstances of the present case by the first appellate court. The judgment of the Madras High Court, as referred above, was also not applicable. He further contended that the ownership of the defendants in respect of the disputed house was fully proved by oral as well as documentary evidence. He referred Ex.1 (true copy Ex.1A), a sale-deed executed by the owner of the house, namely, Sultan Singh, Megh Singh and Fauj Singh, in favour of Loom Singh, who was the grandfather of the defendants. Exhibit-1, the sale-deed, was executed way-back on Paushsudi Ekam Samvat 1890 (corresponding year 1833). He contended that the trial court rightly relied upon this sale-deed. The first appellate court, who reversed the finding of ownership has also not recorded any finding that this sale-deed is forged one. He contended that this sale-deed is about 150 years old document and a presumption for its execution and attestation should have been drawn under Section

90 of the Indian Evidence Act. He also referred the statements of the witnesses DW-1 to DW-6. DW-5 Risal Singh has specifically stated that his forefathers sold the disputed house to the grandfather of the defendants. It is contended that the first appellate court wrongly recorded a finding that from Exhibit 1A it is not clear that on whose behalf it is written and who has written it, whereas from the document Exhibit 1A itself it is clear that it was written by Narsingh on behalf of Sultan Singh, Megh Singh and Fauj Singh in favour of Thakur Loom Singh, who was the grandfather of the defendants. He contended that as per the prevalent practice in the State it was not necessary to put signatures on the document by the scribe but a document was written in their name on their behalf and thereafter the word "*Sahi*" was written on it. Therefore, from the document sale-deed (Exhibit-1) it is clear that who wrote it and in whose behalf and in whose favour it is written. He contended that in similar circumstances this court considered the document wherein the word "*Sahi*" was written and this court found the document to be an authentic document executed by the persons whose names were mentioned in it. In support of his contention, he

referred to the decision in the cases of ***Mahant Gopal Das Vs. Ghisalal (1957 RLW 267)*** and ***Gulzari Lal Vs. Bhagwati Prasad 1968 RLW 501;*** and ***Shailendra Nath Mitra Vs. Girijabhusan Mukherjee (AIR 1931 Calcutta 596)***.

Shri Gopal Garg also referred the evidence of the plaintiff as well as defendants to show that the property in dispute is in actual physical possession of the defendants and contended that the finding in this regard by both the courts below is vitiated and the same is liable to be set-aside by this court. It is contended that if the finding of the courts below is vitiated or injustice is being caused to the concerned party, even if the finding of the courts below may be concurrent, then the same can be interfered with by this court in second appeal under Section 100 of the CPC. In support of his contention he referred to the following decisions:-

1. ***Prataprai N. Kothari Vs. John Braganza (1999) 4 SCC 403***
2. ***Mohd. Yunus Vs. Gurubux Singh (1995) Supp (1) SCC 418***
3. ***Sundra Naicka Vadiyar Vs. Ramaswami Ayyar, (1995) Supp***

(4) SCC 534

Shri Gopal Garg further contended that although from the evidence on the record it is proved that the defendants are in actual physical possession of the disputed house but even if for the sake of argument it is assumed, although not admitted, that the plaintiff is in possession of the disputed house then also no injunction can be granted against the defendants, who are real and true owner of the house, in dispute. He contended that it is a settled law that true owner cannot be restrained by way of injunction and in support of his submission he referred to the decisions in the case reported in ***Prataprai N. Kothari Vs. John Braganza (1999) 4 SCC 403***. He, therefore, contended that the judgment and decree passed by both the courts below be set aside and the suit of the plaintiff for permanent injunction be dismissed.

Learned counsel for the respondents, Shri Rajnish Gupta, on the other hand, supported the judgment of the first appellate court and contended that the first appellate court had jurisdiction to reverse the finding of ownership also in favour of the plaintiff while exercising the powers under Order 41

Rule 22 as well as Order 41 Rule 33 of the CPC. In support of his contention, he referred to the relevant provisions of the Code of Civil procedure and also the decisions in the cases of ***M.M. Chetti Vs. C. Coomaraswamy (AIR 1980 Madras 212)*** and ***Mahant Dhangir Vs. Shri Madan Mohan (AIR 1988 SC 54)***.

He further contended that Section 90 of the Evidence Act is not applicable in the present case as under the provisions of Section 90 of the Evidence Act a presumption can be only in respect of signature but not in respect of recital of the document. He also contended that Exhibit-1A has already been discarded by the first appellate court as from this document it is not clear as to who has written it and for want of signature of the scribe. He contended that the law cited by the learned counsel for the appellants in this regard is not applicable in the facts and circumstances of the present case and the same is distinguishable and, in his support, he referred to the following decisions:-

1. Kanhaiyalal Vs. Jamnalal (1950 RLW 199)

2. Kotiswar Mukherjee Vs.

Paresh Nath Mukherjee (AIR 1956 Calcutta 205)

So far as the finding in respect of possession of the property, in dispute, is concerned, he contended that both the courts below have recorded a concurrent finding that the plaintiff is in possession of the disputed property and this finding, being a finding of fact, should not be interfered with by this court and in support of his contention he referred to the decision in the case of ***Mst. Sugani Vs. Rameshwar Das (2006 (4) Supreme 684)***. He, therefore, contended that there is no merit in the appeal and the same is liable to be dismissed.

I have considered the submissions of the learned counsel for both the parties and also the case law cited in support of their respective submissions.

The first question involved in the present case is about raising presumption in respect of document Exhibit-1A under Section 90 of the Evidence Act, which is of Samvat Year 1890 (corresponding Year 1833).

For ready reference it will be convenient to

refer Section 90 of the Indian Evidence Act, 1872, which is reproduced as under:-

> "90. Presumption as to documents thirty years old. - Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.
>
> Explanation.- Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable."

In the case of ***Mahant Gopal Das Vs. Ghisalal (1957 RLW 267)***, this Court considered the definition of word "signature" as defined in Section 3 (56) of

the General Clauses Act and also the dictionary meaning of it. This Court, in the above referred case, held as under:-

> "9. The definition in the General Clauses Act is neither exhaustive nor complete. The meaning of the word "signature" in the Shorter Oxford English Dictionary is -
>
> The name (or special mark) of a person authentication of some document or writing, written with his or her own hand as an -
>
> In the present case, the document bears the seal of the defendant and according to the evidence it was affixed by the defendant himself. Instead of scribing his own name, the defendant thought fit to scribe *sahi*. It is not uncommon in this part of the country for people of high rank to refuse to scribe their own names, but instead to write the word *sahi*. The real test is what was intended by scribing a particular word on a document. In the present case the evidence is that the document was written on instructions of the defendant, and in token of his own execution he wrote the word *sahi* and affixed his seal. In the circumstances the scribing of the word *sahi* at the top of the document coupled with the affixation of the seal amounts to an authentication of the document

> as one executed by the defendant himself. The contention raised, therefore, has no force."

In the case of ***Shailendranath Mitra Vs. Girijabhushan Mukherji (AIR 1931 Calcutta 596)***, a similar type of document was also considered where only mark "shree sahi", in place of signature, was mentioned and the document was found to be an authenticated and the Calcutta High Court held as under:-

> "It is next to be considered whether there is any force in the argument advanced in this Court for the first time, relating to the admissibility of the document, Ex.A. No question, which could be raised in view of the provisions contained in S.90, Evidence Act, was raised at any previous stage of the proceeding. A presumption as to the document having been executed by Kumar Bijaykeshab Rai Bahadur, whose name occurs in the body of the document, does to my mind arise in favour of the respondents before us, and it was for the appellant to rebut the presumption, if they could be placing materials before the Court which was in their possession and power. Nothing like that was done. A question more important than the one

considered above, was raised before us by urging that the document, Ex.A, not having been signed, was void and inoperative in law, and could not therefore be treated as evidence in support of the case sought to be made out by the respondents, the lessees, based entirely on this document. It has been contended that the endorsement "shree sahi" occurring in the document could not be treated as a signature of Kumar Bijaykeshab Ray Bahadur. Our attention has been drawn by the learned advocate for the appellants to the interpretation given by the General Clauses Act to the word "sign". It appears however that this interpretation is not of much assistance to the appellants, in the circumstances of the case before us. According to the general policy of the law "signature" includes a mark: See Pran Krishna Tewary v. Jadu Nath Trivedy (1898) 2 C.W.N. 603 : a mark being a sort of symbolic writing. In the case before us the question is whether the mark "shree sahi" can be taken to be the signature of the person whose name appears in the document, Ex.A, as the executant of the same. In our judgment the presumption of execution of the document being in favour of the respondents, that presumption extends to this also: that the mark put on the same, indicated that the document was signed by the executant by a sort of symbolic writing,

> which is to be taken to be the signature, in the absence of proof to the contrary. In this view of the case, the document, Ex.A, must be taken to have been signed by the executant and was valid and operative as such; and its genuineness having been established the document was a valuable piece of evidence before the Court in support of the case for the respondents in this appeal."

In the case of ***Kanhaiyalal Vs. Jamnalal (1950 RLW 199)*** this Court (Udaipur Bench) also considered the presumption of genuineness regarding anonymous document under Section 90 of the Evidence Act and held as under:-

> "Section 90 does not lay down that there is any presumption of genuineness regarding anonymous document the writer of which is not known. Where an entry in an ancient document is not signed by the person who wrote it and there are no materials upon which one can say that a particular person purported to have written it except a general statement that it is kept amongst the family records as a record of the family transactions, the document cannot be taken to be properly proved by virtue of presumption under sec.90."

In ***Kotiswar Mukherjee Vs. Paresh Nath Mukherjee (AIR 1956 Calcutta 205)***, the Calcutta High Court also considered the provisions of Section 90 of the Evidence Act and held as under (Head-Note of Para 13):-

> "Section 90 makes it clear that the presumption which is to be raised relates only to the signature, execution or attestation of a document. It does not involve any presumption that the contents of the document are true or that it had been acted upon. Such allegation has to be proved on adducing proper and relevant evidence."

I have examined the document Exhibit-1A. The original document - sale-deed (Exhibit-1) has also been produced by the defendants-appellants during the course of arguments for perusal of the court and after its perusal it appears to be very old document. It is further clear that this document has been written as a sale-deed of the property on behalf of Sultan Singh, Megh Singh and Fauj Singh in favour of Thakur Loom Singh, who is said to be the grandfather of the defendants. The consideration has been mentioned as Rupees twenty and Aana Four. It is mentioned in the

document Exhibit-1A that it has been written in the presence of representatives of four villagers and Teekam Singh, Data Singh, Mehtab Singh, Dan Singh, Ratan Singh, Perthi Singh, Herdeh Singh, Param Sukh, Keshor Singh, Bheron Singh of Vakhatpura Mengri. The document is written under the handwriting of one Narsingh, who has further written that both the parties are present and the word '*sahi*' is also written on it. The date of execution of the document has also been mentioned as Paushsudi Ekam Samvat 1890. The document Exhibit-1A reveals that the name of seller and purchaser and consideration are mentioned in it. The names of witnesses have also been mentioned and by whom it is written is also mentioned.

All these facts were mentioned by the trial court in the judgment dated 4th of August, 1981 and a finding was recorded that the defendants are owner of the disputed house but the first appellate court, while deciding this part of Issue no.1 wrongly recorded a finding that it is not known as to who wrote this document and sellers have not put their signatures on it. The first appellate court did not consider the law laid down by this court in the case

of *Mahant Gopal Das Vs. Ghisalal (1957 RLW 267)*. The finding of the first appellate court in this regard is absolutely perverse, based on misreading of evidence and the same is liable to be set-aside.

Apart from above, it is also relevant to mention that there is sufficient evidence adduced on behalf of the defendants including the statement of DW-5 Risal Singh to prove the ownership/title of the defendants in respect of the disputed house. The learned lower court held that the plaintiff has failed to prove that he is owner of the disputed house. From the evidence of the plaintiff it is clear that he has no documentary evidence in support of his case in respect of the disputed house whereas Exhibit-1A, the sale-deed, is there in favour of the defendants. The first appellate court raised a presumption under Section 110 of the Evidence Act in favour of the plaintiff on the basis of his so-called long possession over the house, in dispute, and decided this part of Issue in favour of the plaintiff. The first appellate court has not considered the oral and documentary evidence correctly and finding of the first appellate court in this regard is based on misreading of documentary as well as oral evidence,

therefore, the same is set-aside and it is held that the plaintiff has failed to prove that he is the owner of the disputed house.

Now the second question which arises for consideration is as to whether the plaintiff is in possession of the house, in dispute, and he is entitled for permanent injunction in his favour. The learned counsel for the appellant has twofold arguments in this regard. First argument is that even if it is assumed for the sake of argument, though not admitted, that defendants are not in possession and the plaintiff is in possession of the disputed house, even then the defendants, being the real and true owner of the disputed house, cannot be restrained by way of permanent injunction and in support of his contention he referred to the following decision:-

Prataprai N. Kothari Vs. John Braganza (1999) 4 SCC 403.

The another contention of the learned counsel for the defendants in this regard is that from the evidence on the record it is clear that the plaintiff was domestic servant of the defendants and, therefore,

the disputed property was given to him four-five years ago and from the evidence it has come on the record that the plaintiff left the disputed house and handed-over the possession thereof back to the defendants. He referred the statements of the plaintiff's as well as the defendants' witnesses and contended that the plaintiff himself has admitted that he had gone to another village. PW-2 Jatan Singh also admitted that he is not aware as to whether the plaintiff is living in the house, or not. PW-3 Durga Singh has stated that because of threatening of dacoits the plaintiff has left the village itself. Therefore, he abandoned the property. PW-4 Kalyan Singh has also not stated that the plaintiff is in possession of the house. DW-1 Gulab Singh, in his statement, has stated that the disputed house is in their possession. DW-2 Chirmoli has also stated that the defendants are in possession of the disputed house. DW-4 Shiv Nath Singh, DW-5 Risal Singh and DW-6 Shrawan have also stated that the defendants are in possession of the house, in dispute. Therefore, his contention is that in view of the aforesaid statements of the plaintiff's as well as defendants' witnesses it is clear that the finding of both the courts below in respect of possession over the disputed property is absolutely illegal, perverse

and vitiated and it is a settled law that even if there is a concurrent finding of fact which is based on misreading or non-reading of evidence, the same can be interfered with by the High Court.

The learned counsel for the respondents contended that in the written statement there is no pleading that the possession of the disputed house was again handed over to the defendants. He contended that the defendants have pleaded that 4-5 years ago the possession of the house was given to the plaintiff being their domestic servant and thereafter there is no pleading that the possession of the same was given back to the defendants.

The learned counsel for the appellants contended that the possession of defendants over disputed house is fully proved from the evidence on the record and even if there is some discrepancy in the pleading and proof, and if evidence is available, then a finding can be recorded on the basis of evidence in absence of pleading even.

In ***Prataprai N. Kothari Vs. John Braganza*** (Supra) their Lordships of the Hon'ble Supreme Court

held as under:-

> "11. We have already extracted the summary of conclusions arrived at by the learned Single Judge of the High Court. That shows that his conclusions were vitiated by his view that the appellant had title and possession followed title. It is quite obvious that the learned Single Judge had not taken note of the principle of possessory title or the principle of law that a person who has been in long continuous possession can protect the same by seeking an injunction against any person in the world other than the true owner. It is also well settled that even the owner of the property can get back his possession only by resorting to the due process of law."

In ***Bhagwati Prasad Vs. Chandramaul*** ***(AIR 1966 SC 735***), their Lordships of the Hon'ble Supreme Court held as under:-

> "Undoubtedly if a party asks for a relief on a clear and specific ground, and in the issues or at the trial, no other ground is covered either directly or by necessary implication, it would not be open to the said party to attempt to sustain the same claim on a ground which is entirely new. But in considering the application of this doctrine to the facts of

> a particular case Court must bear in mind the other principle that considerations of form cannot over-ride the legitimate considerations of substance."

I have considered the law laid down by the Hon'ble Supreme Court in Prataprai N. Kothari's case (Supra), which is fully applicable in the present case. If the finding of both the courts below in respect of possession is not disturbed even then the plaintiff is not entitled for any relief of permanent injunction against the defendants, who are true owner of the disputed property.

The Hon'ble Supreme Court in ***Mohd. Yunus Vs. Gurubux Singh (1995) Supp (1) SCC 418***, considered the scope of second appeal under Section 100 of the CPC and interference by High Court with factual findings, and held as under:-

> "Where there is a gross mis-appreciation of evidence which goes to the root of the matter, certainly the second appellate court can exercise its jurisdiction. Here the documents which are relied on by the appellant do not show that it was addressed to Respondent G. In order to

> establish the same, the postman should have been examined. The High Court is right in its conclusion. As regards the next contention, the mere *ipse dixit*, even without any cross-examination by the Supreme Court of the appellant, will not establish that the money-orders were addressed to the respondent."

In ***Sundra Naicka Vadiyar Vs. Ramaswami Ayyar, (1995) Supp (4) SCC 534***, their Lordships of the Hon'ble Supreme Court again considered the scope of second appeal with regard to interference by High Court in concurrent finding of fact by both the courts below and held as under:-

> "Apart from the reasons given by the High Court, ignoring some of the documents which were vital for deciding the question of possession also vitiated the finding on the question of possession recorded by the trial court as well as the first appellate court. Apart from the documents evidencing the compromise and containing the recital of surrender of possession by the appellant to the respondent, the other material documents were the orders made in the eviction proceedings by the Revenue Court when the matters were taken up by the Revenue Court

> and dismissed on the basis of the compromise accepted by the parties who were present. Ignoring these orders and overlooking the logical effect thereof and basing the conclusion on the question of possession only on the oral evidence adduced by the appellant did cause an infirmity in the finding of fact which justified interference in second appeal."

In ***M/s. Variety Emporium Vs. R.M. Mohd. Ibrahim Naina (AIR 1985 SC 207)***, an interference was made in concurrent findings by three courts, their Lordships of the Hon'ble Supreme Court held that jurisdiction has to be exercised sparingly, but, that cannot mean that injustice must be perpetuated because it has been done two or three times in a case. The burden of showing that a concurrent decision of two or more courts or Tribunals is manifestly unjust lies on the appellant. But once that burden is discharged, it is not only the right of the party but the duty of Supreme Court to remedy the injustice.

So far as the present case is concerned, the evidence on the record, as discussed above, makes it clear that the plaintiff was domestic servant of the

defendants and he was given the disputed house 4-5 years ago but thereafter he left the village and handed over the possession of the house to the defendants. Although there is no specific pleading in the written statement that the possession of the house was again given back to the defendants, but, from the evidence on the record, it is clear that earlier the possession of the house was given to the plaintiff and it was given back by him to the defendants and on the date of filing of the house the defendants were in possession of the house, in dispute. When sufficient evidence is available on the record then the finding in this regard is liable to be interfered with and cannot be sustained only on the ground that there is slight variance in between pleading and proof. After considering all the evidence on the record I am satisfied that the finding in respect of Issue No.1 relating to possession, recorded by both the courts below, are perverse and the same are liable to be set-aside, otherwise it will result in miscarriage of justice.

In view of the above discussion, I find that the suit for permanent injunction filed by the plaintiff could not have been decreed for the reasons

– firstly that the defendants were real and true owner of the disputed house, therefore, they could not have been restrained and secondly, in the present case, after scrutiny of the evidence it is clear that the defendants are in actual physical possession of the house, in dispute.

Consequently, the second appeal is allowed. The judgment and decree passed by both the courts below are set aside. The suit of the plaintiff for permanent injunction against the defendants is dismissed with no order as to costs.

(Narendra Kumar Jain) J.

//Jaiman//